IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 330

UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFFILIATED WITH THE CONGRESS OF INDUSTRIAL ORGANIZATIONS, UAW-CIO, *Appellant*,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD and KOHLER CO., a Wisconsin corporation, *Appellees*.

On Appeal from the Supreme Court of Wisconsin

MOTION OF APPELLEE KOHLER CO. TO DISMISS APPEAL

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INDEX

TABLE OF AUTHORITIES CITED

CASES:

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COUNTERSTATEMENT OF THE CASE

The order of the Wisconsin Employment Relations Board which has been enforced by the Wisconsin

Supreme Court directed appellant Union, its Local 833, and their officers, members and agents to cease and desist from:

> "1. Coercing and intimidating any person desiring to be employed by the Kohler Company in the enjoyment of his legal rights, intimidating his family, picketing his domicile, or injuring the person or property of such persons or his employee."
>
> "2. Hindering or preventing by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of lawful work or employment by any person desirous of being employed by the Kohler Company."
>
> "3. Obstructing or interfering in any way with entrance to and egress from the premises of the Kohler Company."
>
> "4. Obstructing or interfering with the free and uninterrupted use of public roads, streets, highways, railways or private drives leading to the premises of the Kohler Company."

In addition appellant Union and the other appellants in the state Supreme Court were directed to take the following affirmative action:

> "1. Limit the number of pickets around the Kohler Company premises to a total of not more than 200, with not more than 25 at any one entrance. Such pickets are to march in single file and to at all times maintain a space at least 20 feet in width at each entrance to the Kohler Company premises over which pickets will not pass and on which persons either on foot or in conveyance may freely enter or leave the premises without interference."

The Supreme Court of Wisconsin concluded that the State Board's findings of fact underlying the foregoing order were in all respects supported by substantial evidence and that the order was an appropriate remedy for the unlawful conduct disclosed by the State Board's findings. These conclusions of the State Supreme Court are not challenged here.

Before this Court the sole ground advanced for reversal of the state court judgment is the asserted fact that the Union conduct involved lies within the exclusive regulatory power of the National Labor Relations Board. This appellee concedes that the federal question thus presented was adequately raised before the State Board and before the State Circuit and Supreme Courts.

This appellee further concedes that its operations affect commerce within the meaning of Section 2 (7) of the National Labor Relations Act; as amended.

THE EXTENT OF THE FEDERAL QUESTION PRESENTED

Concededly some, but not all, of the conduct prohibited by paragraphs numbered 1 and 2 of the cease and desist portion of the State Board's order would be prohibited by the National Labor Relations Act as amended, and therefore, a remedy for such conduct would be afforded by Section 8 (b) (1) (A) of that Act.

With respect to paragraphs numbered 3 and 4 of the cease and desist portion of the State Board order it is submitted that no parallel remedy exists under the federal act. The National Labor Relations Board has no regulatory power over the use of state roads or highways as such. Of course, where the use of highways and roads is denied to employees as a means of

coercing them in the exercise of rights guaranteed by Section 7 of the Act, the Board has power to prohibit the continuance of the coercive tactics. Here, however, paragraphs 3 and 4 of the State Board Order are unrelated to coercion of employees. They are concerned solely with the regulation of the use of streets and highways lying within the State of Wisconsin. Regulatory auth-rity over these matters is conferred on the State Board by Wisconsin Statutes, 1953, Section 111.06 (2) (f), which provides that:

> "(2) It shall be an unfair labor practice for an employee individually or in concert with others:
>
> * * *
>
> (f) . . . to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance."

The fact that the state has elected to deal with these activities by denominating them an unfair labor practice and vesting jurisdiction over them in its Employment Relations Board is, we believe, a matter of indifference. *Algoma Plywood & Veneer Corp.* v. *Wisconsin Board*, 336 U. S. 301. See also, *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468. So long as the state's regulation of the use of its streets and highways abridges no federally protected right, the state is free to act as it sees fit. *Schneider* v. *Irvington*, 308 U. S. 147, 160. Here, appellant does not contend in this Court, nor did it contend in the state proceedings, that the action of the state has interfered with the exercise of its right to publicize its dispute with this appellee. See, *Schneider* v. *Irvington*, *supra*. Indeed, that portion of

the State Board's order limiting the number of pickets to 200 at any one time would seem to preclude such an argument.

Accordingly, paragraphs 3 and 4 of the cease and desist portion of the decree enforced by the Supreme Court of Wisconsin are based on an adequate non-federal ground. As to them, the appeal should be dismissed for want of any federal question.

Turning to that part of the state court decree which directed appellant to limit the number of pickets around appellee's plant and placed certain other restrictions on the conduct of the pickets, it is sufficient, we believe, to point out that the National Labor Relations Board has held that this area is appropriate for state regulation and is, moreover, closed to regulation by the Board itself.

In *Cory Corporation*, 84 NLRB 972, 977 (1949), the Board said:

> ". . . Legislative History supports the view that, in enacting this section [Section 8(b)(1)(A)], Congress also intended to prohibit conduct characterized by the popular term 'mass picketing.' These particular words, however, do not appear in the statute itself, and nowhere in the reports or debates is 'mass picketing' explicitly defined. The term must, therefore, be read in the context of Section 8 (b) (1) (A), which simply says that labor organizations shall not 'restrain' or 'coerce' employees. So read, it cannot be construed as contemplating that this Board shall affirmatively regulate the number of persons who may properly picket an establishment. That is primarily a matter for the local authorities. Our function, rather, as we see it, is limited to determining whether picketing as conducted in a given situa-

tion, whether or not accompanied by violence, 'restrained' or 'coerced' employees in the exercise of their rights guaranteed under the Act, and if so, to enjoin such conduct. In these circumstances, the number of pickets has relevance only as it tends to establish the potential or calculated restraining or coercive effect of massed pickets to bar nonstriking employees from entering or leaving the plant . . ."

Thus, the affirmative portion of the State Court decree rests upon an adequate non-federal ground, i. e., regulation of the use of streets and highways lying within the State of Wisconsin. As to this portion of the decree the appeal should also be dismissed for want of any federal question.

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY VIRTUE OF THE EXISTENCE OF A PARALLEL FEDERAL REMEDY WITH RESPECT TO CERTAIN ASPECTS OF THE STATE DECREE

Appellant insists that this Court's decisions in *Garner* v. *Teamsters Union*, 346 U. S. 485; *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468; *General Drivers* v. *American Tobacco Co.*, 348 U. S. 978; *Plankinton Packing Company* v. *Wisconsin Board*, 338 U. S. 953; and *Building Trades Council* v. *Kinard Construction Company*, 346 U. S. 933, have now established that Congress intended to preempt completely the field of labor relations affecting interstate commerce by enacting the Labor-Management Relations Act of 1947. On this ground, appellant asks the Court to overrule, not only *Allen-Bradley Local 1111* v. *Wisconsin Board*, 315 U. S. 740, but also *United Construction Workers* v. *Laburnum Construction Corporation*, 347 U. S. 656.

Failing that broadside attack on state regulatory authority, appellant argues that at least the states have

been deprived of the power to act through an administrative remedy which parallels a remedy available under the amended National Labor Relations Act.

It is important to note, however, that none of the cases on which appellant relies involved mass picketing, intimidation of employees, or the other acts of violence and coercion involved in this case. Moreover, in both the *Garner* and *Anheuser-Busch* opinions the Court was careful to point out that such conduct was not involved and to reaffirm the continuing right of the states to regulate activities of that type. And to these cases may be added *International Union* v. *Wisconsin Board*, 336 U. S. 245, 253; and *International Union of U. A. A. & A.* v. *O'Brien*, 339 U. S. 454, 459, where the Court also recognized the right of the state to prohibit concerted employee conduct amounting to a breach of the peace.

Appellant would evidently treat these various restatements of the scope of state power over coercive tactics as mere judicial inadvertences—assuming perhaps that the Court was unaware of the existence of Section 8 (b) (1) (A) of the amended Act when it made them. We believe, on the other hand, that they represent a considered construction of the Act intended to forestall any doubts as to state authority in this area.

We submit further that the fact that this Court has uniformly relied upon *Allen-Bradley Local 1111*, as establishing the powers of the states in this area of coercive and violent conduct, has additional significance in connection with appellant's argument that the states may not deal with activity of this type by means of an administrative remedy which parallels the remedy afforded by the National Labor Relations Act. For in

Allen-Bradley the state had acted through precisely the same administrative and judicial machinery which was invoked in this case. Thus, we read the Court's numerous approving references to *Allen-Bradley*, not only as a recognition of the power of the state to regulate conduct such as is here in issue, but also as an endorsement of the exact remedy here utilized by the State.

Reason and common sense dictate the same result. Where Congress has, in fact, pre-empted a given area of the labor relations field, it is reasonable to assume that it also intends that its remedy shall be exclusive. See *Garner* v. *Teamsters Union*, *supra*. But where Congress has not pre-empted the regulated area, it is absurd to say that it has "pre-empted" the remedy or that it intends that its remedy shall be exclusive. Exclusiveness of remedy follows from substantive pre-emption; it cannot exist apart from it. See *Algoma Plywood and Veneer Co.* v. *Wisconsin Board*, 336 U. S. 301, 305-306.

THE LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT SHOWS THAT CONGRESS DID NOT INTEND TO OUST THE STATES OF JURISDICTION OVER VIOLENT AND COERCIVE CONDUCT IN THE LABOR RELATIONS FIELD

Section 8 (b) (1) of the National Labor Relations Act, as amended, was one of the most controversial sections of the 1947 amendments to the Wagner Act. As the Bill which ultimately became the Taft-Hartley Act was reported from the Senate Committee on Labor and Public Welfare, it contained no provision making it an unfair labor practice for a union to coerce or restrain employees in the exercise of rights guaranteed by Section 7. 1 Legislative History of the Labor

Management Relations Act 1947, P. 441. In a statement of Supplemental Views attached to the Committee Report, however, a minority of the Committee announced that they would seek to insert such a provision in the Bill by amendment on the Senate floor. Id. at P. 456. Summarizing their reasons for offering such an amendment, the Committee Minority stated (Id. at P. 456):

> "The Committee heard many instances of union coercion of employees and their families in the course of organizing campaigns; also direct interference by mass picketing and other violence. Some of these acts are illegal under state law, but we see no reason why they should not also constitute unfair labor practices to be investigated by the National Labor Relations Board and at least deprive the violators of any protection furnished by the Wagner Act . . . ."

When the Bill (S. 1126) reached the floor, the proposed amendment was offered by Senator Ball of Minnesota for himself and Senators Byrd, George and Smith of New Jersey. 2 Legislative History of the Labor Management Relations Act 1947, P. 1018. It provoked an extensive debate in which the principal participants were Senators Ball and Taft, in support of the amendment, and Senators Morse, Ives and Pepper in opposition.

During the course of this debate most of the principal participants on both sides indicated plainly that the amendment was not intended to oust the states of jurisdiction over violent and coercive conduct. The amendment was viewed by all concerned as affording an alternative or supplementary remedy to any already available under state law.

Thus, Senator Taft, in a colloquy with Senator Pepper, made the following statement (Id. at P. 1031):

> ". . . There are plenty of methods of coercion short of actual physical violence. So that in this section there is no duplication whatever. But suppose there is duplication in extreme cases; suppose there is a threat of violence constituting violation of the law of the state. Why should it not be an unfair labor practice? It is on the part of the employer. If an employer proceeds to use violence, as employers once did, if they use the kind of goon-squad tactics labor unions are permitted to use—and they once did—if they threaten men with physical violence if they join a union, they are subject to State law, and they are also subject to be proceeded against for violating the National Labor Relations Act. There is no reason in the world why there should not be two remedies for an act of that kind."

At a later date, Senator Ball, addressing himself to the question of the need for the amendment, made the following remarks (Id. at P. 1200):

> "It is no wonder that local communities and their peace officers have been reluctant vigorously to enforce law when they saw the Federal Government was holding the unions exempt from any kind of Federal regulation. The only laws we have had restrain employers and not unions. So it may well be that many of the types of activities of unions which we are seeking to restrain somewhat by this mild amendment are the kind of activities which would be corrected by good local law enforcement. But I think we shall encourage that kind of law enforcement if the Federal Government, acting through Congress, states clearly its position that individual employees are entitled to their right of self-organization free from

coercion from any source, whether it be the employer, the union or some outside source."

Opposing the Ball amendment, Senator Ives showed that he understood it would have the same effect. The Senator said (Id. at P. 1021):

"Moreover, assuming that these proscribed acts involve violence and physical coercion, the provision is unnecessary because offenses of this type are punishable under State and local police law. In fact, the enactment of this provision would make unions and their agents liable twice for the same offense, once under State and once under Federal law. Employers run no such risk for interfering with their employees' rights."

With this statement Senator Morse expressed agreement. Id. at P. 1196.

Senator Murray—one of the leaders of the opposition to the Taft-Hartley Act in the Senate, though not a principal participant in the debate on the Ball amendment—had the same understanding of the effect of that amendment. Senator Murray inserted in the record a written analysis of the whole Bill, which included the following comment respecting the proposed Section 8 (b)(1) (Id. at P. 1578):

"Comment: The proposal contained in Section 8(b)(1) making it an unfair labor practice on the part of the unions and their agents to restrain or coerce employees in the exercise of rights guaranteed in Section 7 would lead to protracted litigation, because of the difficulty in determining who are agents of a labor organization and what constitutes restraint and coercion within its meaning. Moreover, assuming that these proscribed acts

involve violence and physical coercion, the provision is unnecessary because offenses of this type are punishable under State and local police laws. In fact, the enactment of this provision would make unions and their agents liable twice for the same offense, once under State and once under Federal law. Employers run no such double risk for interfering with their employees' rights. . . ."

Thus, throughout the debate on the so-called "Ball" amendment—which is now Sec. 8(b)(1) of the Act—it was the understanding of both the proponents and the opponents of the amendment that it would leave unimpaired the power of the states to deal with violent and coercive conduct on the part of the labor unions. As has been demonstrated this understanding of the effect of the amendment was brought to the attention of the full Senate on several occasions. Accordingly, it must be assumed that the amendment was adopted with this construction and this purpose in mind.

CONCLUSION

Paragraphs numbered 3 and 4 of the cease and desist portion of the order of the State Board and that portion of the State Board's order which directed appellant to take certain affirmative action present no federal question for decision. As to them the appeal should be dismissed for that reason.

The remaining portions of the Board's order, as enforced, are clearly within the State's regulatory powers. Since the only reason advanced for reversal on this appeal is the alleged lack of jurisdiction in the State Board and Courts, the appeal with respect to

these portions of the order should be dismissed for want of a substantial federal question.

Respectfully submitted,

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